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Supreme Court of the United States.

October Term, 1932.

No. 131.

American Surety Company of New York,
Appellant,

v.

Teresa Marotta,
Appellee.

BRIEF FOR THE APPELLEE.

GEORGE I. COHEN,
JOSEPH SANTOSUOSSO,
Attorneys for the Appellee.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 131.

AMERICAN SURETY COMPANY OF NEW YORK,
APPELLANT,
v.
TERESA MAROTTA,
APPELLEE.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

This is an appeal by the American Surety Company of New York from a decree of the United States Circuit Court of Appeals for the First Circuit, dated April 4, 1932, dismissing an involuntary petition in bankruptcy filed by the American Surety Company of New York, Appellant, against Teresa Marotta, Alleged Bankrupt, Appellee.

The petition in bankruptcy was filed by the appellant as a single creditor, and sets forth that there were less than twelve creditors. The petition alleges that the petitioner was a creditor to the amount of $7023.78, and that within four months of the filing of the petition the alleged bankrupt conveyed to one Muollo two parcels of real estate; that each conveyance was without consideration and was made by the alleged bankrupt with the fraudulent intent and purpose of putting said real estate beyond the reach of her creditors, including the petitioner.

The petitioner, in the petition, offered to surrender upon adjudication, for the benefit of the estate in bankruptcy, any liens it had acquired by an equitable attachment of the

above-described real estate alleged to be so fraudulently conveyed.

The alleged bankrupt filed an answer denying that she is insolvent, or that she committed the act of bankruptcy alleged in the petition, or that the petitioner is a creditor or has a provable claim against her. The matter was then referred to a master.

Some time prior to 1927 the husband of the alleged bankrupt purchased two parcels of land in Boston and the house where he now lives in Winthrop. While the deeds of the several parcels were paid for by the husband, the deeds were all taken in the name of the wife, but the husband always had attended to the management of the several parcels and collected the rents.

In April, 1927, one Natale, an employee of Mario Mogliani, whose place of business was in Providence, Rhode Island, went to Arcangelo Marotta, husband of the appellee, to seek assistance in obtaining a surety bond. A part of the business of Mogliani was conducting public exhibitions of fireworks. Before giving any such exhibitions in Massachusetts an exhibitor is required by statute (c. 148, secs. 57C and 57D, G.L. Mass.) to file a bond with sufficient sureties with the State Treasurer to answer for any damage to person or property resulting therefrom. While there was some dispute as to what was said by Natale to the Marottas as to the nature of the instrument to be signed, the husband told Natale that he could not sign a bond as the property was in his wife's name. As a result of the conference, Natale and Mr. and Mrs. Marotta went to the office of a lawyer, where Mrs. Marotta, the alleged bankrupt, signed an application for a surety bond, commonly referred to as a "Fireworks Bond," to be executed by Mogliani as principal and the appellant as surety, and running to the Treasurer of the Commonwealth of Massachusetts, and conditioned to protect persons and property from any loss or damage resulting from a public exhibition of fireworks.

In the application for the bond, which was at some time also signed by Mogliani, the applicants were described as indemnitors, and each agreed to hold the appellant harmless in case it was called on as surety to make good any loss or damage to person or property resulting from any exhibition of fireworks given by Mogliani in Massachusetts.

This instrument of indemnity was under seal, and was executed at the office of the lawyer without the knowledge of the appellant, as neither Natale nor the lawyer in any way represented the appellant. In consideration of Mrs. Marotta assuming the obligation of an indemnitor under this instrument, Mogliani paid to her or her husband the sum of $800.

At the time of signing this application, Mrs. Marotta, in the presence of her husband, also signed a statement as to her property, and set forth therein that she had an equity in three parcels of real estate of the value of approximately $60,000 and cash to the amount of $8000. The appellant relied on this statement as true in signing as surety on the bond for Mogliani.

Afterward Mario Mogliani, as principal, signed an instrument purporting to be a bond, but to which he failed to affix his seal, in the penal sum of $15,000, which the appellant signed as surety under its seal. This instrument was delivered to the State Treasurer of Massachusetts, and a certificate that a bond was filed as required by law was issued to the State Fire Marshal and to Mogliani prior to September 26, 1927. While giving a public exhibition of fireworks in the City of Everett on September 26, 1927, one Beatrice Ricci was seriously injured, and claim was made against Mogliani and the appellant was notified as surety on the bond.

The alleged bankrupt was also notified of the claim and that she was liable on the contract of indemnity contained in the application which she signed. On April 12, 1928, an action was brought against Mogliani by Beatrice Ricci, and

Arcangelo Marotta and his wife were also notified of this action. The husband, who, in all matters connected with this case, acted for his wife, consulted counsel, and was notified by counsel for Mogliani that it was a serious matter, and that the appellee might be called on to pay heavy damages under her agreement of indemnity, and suggested it might be better to settle, but Marotta refused, and suggested that the counsel for Mogliani go ahead and try the case.

In February, 1930, the case went to trial, and on March 4, 1930, a verdict against Mogliani was returned for $10,000. Marotta again consulted his counsel, who went to Providence, Rhode Island, where Mogliani's place of business was, and after investigation advised Marotta and the counsel acting for Mogliani that a motion for a reduction of the verdict should be made in the case. On March 5, 1930, a motion for a new trial was filed on the ground that the damages awarded were excessive. On March 30, 1930, the motion was granted, unless a remittitur was filed, which was done, and the damages were reduced to $6540.68 with costs taxed at $110.40. On April 10, 1930, judgment was entered for this amount and an execution issued, on which demand was made upon Mogliani, who was unable to pay.

Following the verdict against Mogliani on March 4, 1930, Arcangelo Marotta went to another lawyer, who knew nothing of the signing of the instrument by which his wife had become an indemnitor of the appellant, or of the verdict against Mogliani; and after some talk about protecting him or his children, Marotta said he wanted a deed made out from his wife to him of certain property which he had bought some time before and had taken the deeds in her name.

On March 18, 1930, a quitclaim deed was executed by the alleged bankrupt and her husband of the two parcels of land referred to and delivered to one Pellegrino Muollo, who afterwards executed two mortgages, one on the Winthrop property and one on the property located on Lewis Street in the City of Boston. The equity in these parcels

was then transferred by Muollo to Arcangelo Marotta in trust for his children. It is not claimed that any consideration passed between Muollo and the Marottas in these transactions.

On April 18, 1930, an action in the name of the State Treasurer was brought on the judgment against the appellant for the benefit of the injured woman. The appellant then paid the amount of the judgment against Mogliani and judgment against the appellant was entered on April 30, 1930.

The appellant in April, 1930, instituted two suits in equity against the appellee, seeking to set aside the conveyances made by the appellee on March 18, 1930, as being fraudulent as to the appellant. On the second suit in equity the property so conveyed on March 18, 1930, was attached and an injunction issued enjoining any further conveyances or encumbering it. On July 18, 1930, the petition in bankruptcy was filed. At the time of filing the petition, and on March 18, 1930, when the alleged fraudulent conveyances were made, the appellant, if a creditor, was the only creditor of the alleged bankrupt.

The appellee's assignments of errors, twenty-eight in number, raise in brief the following issues:

(1) Whether the appellee was induced to sign the contract of indemnity by fraud;

(2) whether she was bound by the contract of indemnity because the bond, when given, did not have attached the seal of the principal;

(3) whether the bond was ever delivered to the State Treasurer at the State House in Boston prior to the exhibition on September 26, 1927, at which the Ricci girl was injured;

(4) whether the appellant was a creditor of the appellee on March 18, 1930, and, if so, whether the conveyances made by the appellee on that date were made to hinder, delay, or defraud the appellant;

(5) and if the appellant was not a creditor of the alleged bankrupt on March 18, 1930, whether the appellant could alone file an involuntary petition in bankruptcy against the appellee, even if, at the time of filing the petition, it had a provable claim;

(6) and whether, having begun an action in the State Courts seeking to set aside the conveyances alleged to be fraudulent, the appellant should in equity be left to its remedy in the State Court.

Of these issues, the United States Court of Appeals considered only the fourth and fifth, which in effect are: that the conveyances on March 18, 1930, did not constitute an act of bankruptcy as defined in section 3 of the Bankruptcy Act, since the appellant was not a creditor as defined in section 1 (9) of the Act at the time of these transfers; and if the petitioner at the time of the alleged act of bankruptcy was not a creditor as defined in the Act, it alone could not file an involuntary petition in bankruptcy, even though it had a provable claim at the time of filing the petition.

Argument.

The appellee, although relying principally upon the fourth and fifth issues as forming the basis for the decision of the United States Circuit Court of Appeals for the First Circuit, respectfully argues and insists that the petition in bankruptcy should be dismissed on all of the six grounds hereinafter set forth:

I. The indemnity agreement in question was signed by the appellee Teresa Marotta, alleged bankrupt, by mark (Exhibit 6), on the original record. Both Teresa Marotta and Arcangelo Marotta are illiterate and unable to read or write either English or Italian, or to sign their names except by a mark. Teresa Marotta, although she has lived in this country over thirty years, neither speaks nor understands English, except to a very limited extent. (This is the findings of fact by the master, 4.)

Mr. and Mrs. Marotta testified that one Antonio Natale procured her signature to the indemnity agreement (Exhibit 6) and the financial statement (Exhibit 7) by representing to her that she was to become responsible on an attachment bond for $1000, and that when Mr. and Mrs. Marotta went to Mr. Good's office where she signed this document, the papers were there all prepared, and she merely signed them and acknowledged them.

This indemnity agreement was then sent from Mr. Good's office in Boston, Mr. Good being an attorney representing Antonio Natale, who was procuring the bond for his employer, one Mogliani of Centredale, Rhode Island, to Mr. Buss, the duly accredited representative of the American Surety Company in Providence, who thereafter issued the surety bond in which Mogliani was principal and the American Surety Company was surety, and the Commonwealth of Massachusetts the obligee, without any further inquiry or correspondence on the part of the American Surety Company with Teresa Marotta.

Whether a contract of indemnity has been made or not in this case depends upon the fact as to whether the said Teresa Marotta knew of the contents and agreed to it, in view of the special circumstances that she was an illiterate person and could not read or write English and signed the said contract by her mark.

McKenney v. *Boston & Maine R.R.*, 217 Mass. 274:

In this case it is reported that the signature by mark calls to the attention of the contracting party the fact that the person who is signing by mark may be an illiterate person, and may not know of the contents of the instrument that he is purporting to sign, and hence there is no meeting of the minds to consummate a contract; and more especially in this case, the American Surety Company, the contracting party, being a company organized to write bonds of various kinds involving fraud, theft, forging, and various other defalca-

tions and weaknesses of human beings, should have communicated at least with Teresa Marotta before issuing the surety bond, in view of the signature by mark, to make certain that she knew of the contents of the said instrument at least to the extent of the nature of the instrument, the amount for which she could be liable and such other matters as would justify the Surety Company in going on the fireworks bond, so called. As to the legal effect of the withholding by the one party executing a surety bond of material facts affecting the risk, and the legal effect of misrepresentations or non-disclosures concerning the bond, see—

Province Securities Corp. v. *Maryland Casualty Co.*, 269 Mass. 75.

II. Whether Teresa Marotta was bound by the contract of indemnity because the bond when given did not have the seal of the principal.

The appellee Teresa Marotta is not liable on the contract of indemnity because of failure of consideration.

In this case the existence of the bond was a prerequisite for liability on the part of Teresa Marotta. There would be no liability on her contract of indemnity unless the American Surety Company gave a valid bond in this case.

Burdett v. *Walsh*, 235 Mass. 153, at 154—

where it was held the existence of a note was a prerequisite of liability, the bond being conditioned upon the guarantee of payment of the note.

Cook v. *Finger*, Mass. 1930 Advance Sheets, 209:

"The satisfaction of every condition precedent is essential to the petitioner's case."

"The claim against the surety or indemnitor in this case is strictissima juris."

Warren v. *Lyons*, 152 Mass. 310, at 312.
Bacon v. *Chesney*, 1 Stark, N.P. 192.

"A precedent condition . . . must be performed or happen before liability arises on the promises which the condition qualifies."

Williston on Contracts, vol. II, sec. 666a, p. 1284.

It is the contention of the appellee in this case that the said bond upon which Mario Mogliani was principal and the American Surety Company was surety, and the Commonwealth of Massachusetts was the obligee, was not a valid obligation because of the failure of the said bond to have a seal annexed to it after the principal's name. The testimony in this case shows that this seal was deliberately left off, whereas Mr. Buss testified it was a perfectly legal seal without the necessity of a sticker if it has a bracket saying L. S. or a seal. The appellee objected to the introduction of Exhibit 1 as a bond, on the ground that the principal did not seal the bond, and counsel for the petitioner admitted that there was no seal thereon, but stated that the cases say it is immaterial under the circumstances.

"It is elementary law that a bond imports a seal."

Mahoney v. *Emergency Fleet Corp.*, 253 Mass. 234.

Cox & Dick v. *United States*, 6 Peters, 172, page 195.

"A bond, no matter how solemnly expressed, subscribed and delivered is of no validity unless it has the authority of the wax."

"A bond is merely an obligation under seal."

Commonwealth v. *Smith*, 10 Allen, 448, 455 (Mass.).

As is said in Williston, Contracts, c. 205:

"The obligation of the maker of a sealed instrument under the common law depends wholly on certain forms

> being observed. If the forms are observed the obligation is binding. The instrument is not evidence of an obligation, it is the obligation itself."

The converse of this is equally true, that if the instrument bears no seal, it is not a bond, and the obligation does not exist. The common law as to bonds has been adhered to with some strictness in this Commonwealth. It was said in *Burns* v. *Lynde,* 6 Allen, 305 (Mass.), at page 312, respecting a bond, that—

> "it is highly useful that a class of instruments should exist, to which persons may resort with a feeling of confidence that they shall not be binding till they are formally executed, and that when thus executed they shall not be liable to be varied or controlled."

Other cases emphasize the necessity of a seal in order to constitute a bond.

Banorgee v. *Hovey,* 5 Mass. 11, 24.
Tasker v. *Bartlett,* 5 Cush. 359, 364.
Bates v. *Boston & New York Central R.R.,* 10 Allen, 251, 254, 256.
Hendee v. *Pinkerton,* 14 Allen, 381, 389.
Macurda v. *Fuller,* 225 Mass. 341, 344.
United States Drainage & Irrigation Co. v. *Medford,* 225 Mass. 467, 470.

This is the law of the Supreme Court of the United States. In *Koshkonong* v. *Burton,* 104 U.S. 668, at page 673, it was said:

> "The word 'bond' at common law (and even now as a general rule) imports a sealed instrument."

In *DeGanay* v. *Lederer,* 250 U.S. 376, at page 381, occur these words quoted from *Blackstone* v. *Miller,* 188 U.S. 189, 206:

"Bonds . . . are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. Bacon v. Hooker, 177 Mass. 335, 337."

It is contended by the appellee in this case that this is an official bond, the obligee being the Commonwealth of Massachusetts, and in contemplation of law the place of making the contract and the performance are in Massachusetts, and the validity, obligation, and interpretation of this bond is to be determined by the law of the Commonwealth of Massachusetts, and by the State laws of Massachusetts. This instrument is not a valid bond, there being no seal opposite the name of the principal.

It is further the appellee's contention that the consideration for the indemnity agreement has failed in that it was conditioned upon the American Surety Company giving a bond; that they did not in fact issue a bond, and therefore there is no liability on the appellee's part.

III. Whether the bond was ever delivered.

There was an additional defense suggested; namely, that there was no evidence in the case that, after the Surety Company bond was executed, it was ever delivered at the State House at Boston, Massachusetts, before the accident that was later sued, or that it was delivered at the State House at the time the accident happened on account of the fireworks exhibition on September 26, 1927, out of which accident a personal injury suit was brought, and later recovery on the bond was had.

On this contention, the testimony of Cynthia W. Arey, who testified twice as to the date when the bond was filed at the State House, was that she was connected with the office of the Treasurer and Receiver General. At first she testified it was filed in April, 1927, presumably April 18th, for an exhibition on April 19, 1927; that she acknowledged the

bond to the State Fire Marshal and sent a certificate to the principal, no copy of which she produced at the trial; that the State Fire Marshal's office told her they could not find the certificate, so that she has not the date, but goes by the date on the bond entirely as being the reason as to why she testified that the bond was presumably filed on April 18, 1927; that in fireworks bonds they have printed certificates; that the State Fire Marshal's office in the Commonwealth of Massachusetts did not have a copy of the certificate in their files in this matter; that they found a little correspondence that was kept, but nothing to show on what date the bond was filed.

Being later recalled and asked to make further search, she testified she made further search and there was no record in her office of the Treasurer and Receiver General of the Commonwealth of Massachusetts as to when the bond was received, and that she called at the State Fire Marshal's office, and they had nothing in their files, and had evidently destroyed the certificate sent to them.

On the above record it is contended by the respondent that there is no evidence upon which the master can find that the bond was delivered at the State House on or before September 26, 1927, when the accident occurred, and that there was no evidence to support the master's finding of fact on request No. 14.

> No. 14: "On April 18, 1927, Raymond Buss, acting for the petitioner, delivered to Mario Mogliani a written instrument (hereinafter called the bond) which was subsequently filed by Mogliani with the treasurer and receiver general of the Commonwealth of Massachusetts and approved by the State fire marshal and the treasurer and receiver general at some time before September 26, 1927."

IV. Whether the appellant was a creditor of the appellee on March 18, 1930, and, if so, whether the conveyances made

by the appellee on that date were made to hinder, delay, or defraud the appellant.

V. And if the appellant was not a creditor of the alleged bankrupt on March 18, 1930, whether the appellant could alone file an involuntary petition in bankruptcy against the appellee, even if, at the time of filing the petition, it had a provable claim.

These two issues, 4 and 5, are considered together, which in effect are: that the conveyances on March 18, 1930, did not constitute an act of bankruptcy as defined in section 3 of the Bankruptcy Act, since the appellant was not a creditor as defined in section 1 (9) of the Act at the time of these transfers; and if the petitioner at the time of the alleged act of bankruptcy was not a creditor as defined in the Act, it alone could not file an involuntary petition in bankruptcy, even though it had a provable claim at the time of filing the petition, there being no other creditors on March 18, 1930.

It will be observed that Teresa Marotta at the time of the alleged fraudulent conveyance had no other creditors, if we except the American Surety Company, nor did she have any other creditors even at the time the involuntary petition in bankruptcy was filed against her.

Section 3 of the Bankruptcy Act, in defining acts of bankruptcy, provides that it shall consist of a person "having (1) conveyed, transferred, concealed or removed . . . any part of his property with intent to hinder, delay or defraud his creditors, or any one of them"; and section 1 (9) of the Act provides that, as used in the Act, the word " 'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy."

The petition in bankruptcy in this case alleges, as the only act of bankruptcy, that the conveyances by Marotta and his wife on March 18, 1930, were made with the intent to hinder, delay, and defraud the petitioner; but the alleged bankrupt in her answer and her counsel in argument deny that the petitioner was a creditor having a claim provable in

bankruptcy at that time; and contend that in order for a fraudulent transfer to constitute an act of bankruptcy, the creditor hindered, delayed, or defrauded must be a creditor with a provable claim at the time.

Counsel for petitioner, however, contends that this is not necessary; that it is sufficient if the petitioner has a provable claim at the time of filing the petition, and cites *In re Van Horn,* 246 Fed. 822. The case cited is not in point, since it appears in that case that there were creditors with provable claims at the time the alleged act of bankruptcy was committed; and, an act of bankruptcy having been committed, any creditor having a provable claim at the time of filing of the petition in bankruptcy is entitled to share in the distribution of the assets and may join in the petition, though he had no provable claim at the time the act of bankruptcy was committed, which is all that the Van Horn case holds.

The contention of the appellee is that a fraudulent transfer, to constitute an act of bankruptcy, must hinder, delay, or defraud a creditor or creditors holding a claim or claims provable in bankruptcy at the time the act is committed: Without an act of bankruptcy an involuntary petition cannot be maintained under section 3 (b) of the Act.

Was the claim of the petitioner against the appellee a provable claim on March 18, 1930?

A transfer made with an intent to defraud a contingent creditor, or even subsequent creditors, may be set aside in the State Courts or by a trustee in bankruptcy under section 70 (e)—

Collier on Bankruptcy (13th ed.), p. 1770;
Thomson v. *Crane,* 73 Fed. 327;
Kautz v. *Sheridan,* 118 Me. 28;
Holbrook v. *International Trust Co.,* 220 Mass. 150;
Mowry v. *Reed,* 187 Mass. 174—

but under the Bankruptcy Act of 1898 contingent claims are not provable in bankruptcy, though unliquidated claims may be, if the liability is fixed by contract.

Section 63 (b) of the Bankruptcy Act.
Collier on Bankruptcy (14th ed.), p. 1419.
In re American Vacuum Cleaner Co., 192 Fed. 939.
In re Inman & Co., 171 Fed. 185.
In re Brinckmann, 103 Fed. 65.

A claim arising out of a tort—the action against Mogliani was based on negligence—is contingent, and is not provable in bankruptcy until reduced to a judgment.

In re Brinckmann, supra.
Beers v. *Hanlin*, 99 Fed. 695.

A verdict alone does not result in that "fixed liability" defined in section 63 as necessary to constitute a provable claim—

Collier on Bankruptcy (13th ed.), p. 1387;
Black v. *McClelland*, Fed. Cases, 1462;
In re Ostrom, 185 Fed. 988—

since a verdict is not conclusive. A motion to set aside a verdict, though based on excessive damages alone, may be granted unless a remittitur is filed, and this cannot be determined until action is had thereon by the Court and plaintiff.

While the relations between the petitioner and the alleged bankrupt in this case were contractual, the petitioner's rights and the appellee's obligations under the contract of indemnity were both contingent until the judgment was entered against Mogliani on April 10, 1930. The alleged fraudulent transfers having been made on March 18, 1930, at which time the petitioner did not have a provable claim against the alleged bankrupt, no act of bankruptcy was com-

mitted thereby within the definition of section 3 (1) of the Act, since no creditor, as defined in section 1 (9) was thereby hindered, delayed, or defrauded.

VI. Whether, having begun an action in the State Courts seeking to set aside the conveyances alleged to be fraudulent, the appellant should in equity be left to its remedy in the State Court.

The appellee's motion for dismissal of petition should have been granted on the general principles of equity.

Bankruptcy is a general suit in equity as an aid to all creditors, citing—

> *In re Maryanov,* 20 Fed. (2d) 939, on page 943, U.S. D.C. N.Y.
> *Corbett* v. *Riddle,* 209 Fed. 811, C.C.A. Va.

There is nothing that the American Surety Company can secure in the United States Court in these proceedings that it could not have secured in the two petitions brought in the State Court to establish its claim there and set aside the same conveyances which in the present case it alleged as her acts of bankruptcy. There are no other creditors in this case with the exception of the appellant, and it is well recognized that the general purposes of the Bankruptcy Court are for a proper distribution of the assets of the bankrupt equitably amongst all the bankrupt's creditors. Indeed, in the State Court proceedings brought by the petitioner, the various rights between the parties as to the existence of the petitioner's claim, as to the validity of the bond, as to whether the bond was ever delivered, as to whether there was a contract entered into between the American Surety Company and Teresa Marotta, as to whether there was a fraudulent conveyance or a conveyance by Teresa Marotta which was valid in law—all these matters are peculiarly governed by the laws of the Commonwealth of Massachusetts and the rules of evidence and the rights of the parties can better be protected and determined in the

State Court, and a more complete hearing had on the merits of the controversy with subsequent protection to either of the parties in the event of mistaken or uncertain principles of law and evidence involved in said issues that can be corrected by the proper tribunals.

It would seem that the interests of justice would best be served by dismissing the present proceedings, and compelling the American Surety Company to seek its remedy in the Court where it first instituted the proceedings. There is nothing that the creditor can get in the United States Court that could not be secured in the State Court.

In re Maryanov, 20 Fed. (2d) 939.

In fact it is suggested that the relief in the State Court is more complete and comprehensive in that if the American Surety Company is successful in this State Court proceeding, the decree there would be that the petitioner's claim would be established, that the conveyance be set aside, that the various grantees of the parcels of real estate alleged to be fraudulently conveyed (and they are all parties to the State Court proceeding) be ordered to hold the said property in trust for the petitioner, and the petitioner would receive full and adequate satisfaction of its claim. Here in the United States Court the decree of adjudication merely adjudicates Teresa Marotta a bankrupt on a record which shows that she has no creditors, and after a trustee will be appointed who will be compelled to bring a suit to set aside these various conveyances, and the trustee in bankruptcy will be in the same position after adjudication as the American Surety Company was before it started in on the proceedings either in the State or in the Federal Court.

I need not cite authorities for the general proposition that an adjudication in bankruptcy is not *res judicata* of the fraudulent conveyances as against grantees and parties therein named.

Therefore, it is respectfully submitted by the respondent, Teresa Marotta, that this Court in its discretion should grant the respondent's motion to dismiss the proceedings on general principles of equity, and on the general authority of estoppel, that the petitioner be estopped from proceeding in the United States Court after having instituted proceedings in the State Court in equity as above described.

It is the contention of the appellee, Teresa Marotta, that the findings of fact of the referee are not supported by the evidence, are clearly against the weight of the evidence, and that the conclusions of law are erroneous, and the same contention is made against the order of the district judge in entering the final decree ordering the adjudication.

No act of bankruptcy having been committed, the petition must be dismissed, citing—

In re Stone, 206 Fed. 356.
Horbach v. *Hill*, 112 U.S. 144.
Brake v. *Callison*, 129 Fed. 221.
Re Callison (D.C.), 130 Fed. 988; affirmed sub nom. *Corin Mfg. Co.* (D.C. Mass.), 185 Fed. 976.
In re Hanyan (Southern District of New York), 180 Fed. 498.
Perry v. *Whitney Co.* (D.C. Mass.), 172 Fed. 745.

Respectfully submitted,

GEORGE I. COHEN,
JOSEPH SANTOSUOSSO,
Attorneys for
TERESA MAROTTA,
Alleged Bankrupt, Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 131.—October Term, 1932.

American Surety Company of New York, Petitioner, *vs.* Teresa Marotta.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 9, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

July 16, 1930, petitioner claiming to be a creditor of respondent in an amount exceeding $7,000 filed a petition in bankruptcy against her in the United States district court for Massachusetts. It alleged that on March 18, 1930, she conveyed her property with intent to hinder, delay and defraud her creditors including the petitioner and that she was insolvent. Respondent's answer denied that she committed the alleged act of bankruptcy or was insolvent or that petitioner was a creditor or had a provable claim against her. The court heard the case on evidence taken by, and the report of, a special master, made findings of fact and adjudged respondent a bankrupt. The Circuit Court of Appeals reversed. 57 F. (2d) 830.

The substance of the findings, so far as material to our decision, may be briefly stated:

Under date of April 18, 1927, one Mogliani as principal and petitioner as surety executed a bond for $15,000 to the treasurer of the Commonwealth of Massachusetts to secure, among other things, the payment of any judgment that might be obtained in an action against the principal for injury resulting to any person by reason of the discharge of fireworks by him at a public exhibition. The bond was made and delivered pursuant to Massachusetts G. L., 1921, c. 148, § 57 C, D. Acts, 1921, c. 500. Petitioner became surety in accordance with an application executed by respondent and in reliance upon her agreement to indemnify it against every claim or liability arising on the bond. The application and agree-

ment were accompanied by a financial statement made by her showing that in addition to considerable cash she owned several pieces of real estate worth much more than the amount of the bond. September 26, 1927, one Beatrice Ricci was injured by fireworks discharged at a public exhibition under the direction of Mogliani. She sued him for damages and, March 4, 1930, got a verdict for $10,000. March 18 respondent conveyed all her real estate to one Muollo and on the same day he mortgaged a part of it and quitclaimed all to her husband to be held by the latter in trust for the benefit of their children. These conveyances covered all respondent's property and were made without consideration and with specific intent on her part to hinder, delay and defraud the petitioner, her only creditor. The verdict having been reduced, judgment was entered April 10, 1930, in favor of Ricci and against Mogliani for $6,650.48. Unable to collect from him, she demanded payment from petitioner. And April 18, 1930, conformably to the statute, a suit on the bond was brought against petitioner to recover for her the amount of the judgment. Some time before it filed the petition in bankruptcy petitioner paid to her attorney the sum claimed and judgment was entered against it for that amount.

The Circuit Court of Appeals sustained respondent's contention that to constitute an act of bankruptcy, a fraudulent transfer must hinder, delay or defraud a creditor holding a claim provable at the time of such conveyance and held that petitioner's claim against respondent was contingent and not provable until the entry of the judgment against Mogliani and that therefore respondent committed no act of bankruptcy. And it directed the district court to dismiss the petition.

Unless required by the Act, the meaning of the word "creditors" as used in § 3a (1) is not to be restricted to those whose claims are provable at the time of the fraudulent conveyance.

Section 1 declares: "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . . (9) 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy". 11 U. S. C., § 1. And § 3a contains the following: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or per-

mitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them". 11 U. S. C.,§ 21a. The decision below shows that at common law the word "creditors" has a broader meaning. But the court construed the definition of creditor, § 1 (9), to be comprehensive and the word "include" to be one of limitation, the equivalent of "include only", and to exclude every person not having a demand presently provable. Its ruling that respondent's transfer of her property to defraud petitioner was not an act of bankruptcy rests upon that construction.

In definitive provisions of statutes and other writings, "include" is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration. *Fraser* v. *Bentel*, 161 Cal. 390, 394. *People ex rel. Estate of Woolworth* v. *S. T. Comm.*, 200 App. Div. 287, 289. *Matter of Goetz*, 71 App. Div. 272, 275. *Calhoun* v. *Memphis & P. R. Co.*, Fed. Cas. No. 2,309. *Cooper* v *Stinson*, 5 Minn. 522. Subject to the effect properly to be given to context, § 1 prescribes the constructions to be put upon various words and phrases used in the Act. Some of the definitive clauses commence with "shall include", others with "shall mean". The former is used in eighteen instances and the latter in nine instances, and in two both are used. When the section as a whole is regarded, it is evident that these verbs are not used synonymously or loosely but with discrimination and a purpose to give to each a meaning not attributable to the other. It is obvious that, in some instances at least, "shall include" is used without implication that any exclusion is intended. Subsections (6) and (7), in each of which both verbs are employed, illustrate the use of "shall mean" to enumerate and restrict and of "shall include" to enlarge and extend. Subsection (17) declares "oath" shall include affirmation. Subsection (19) declares "persons" shall include corporations, officers, partnerships, and women. Men are not mentioned. In these instances the verb is used to expand, not to restrict. It is plain that "shall include" as used in subsection (9) when taken in connection with other parts of the section cannot reasonably be read to be the equivalent of "shall mean" or "shall include only".

There being nothing to indicate any other purpose, Congress must be deemed to have intended that in § 3a (1) "creditors" should be given the meaning usually attributed to it when used in the common law definition of fraudulent conveyances. See *Coder* v. *Arts,* 213 U. S. 223, 242. *Lansing Boiler & Engine Works* v. *Ryerson,* 128 Fed. 701, 703. *Githens* v. *Shiffler,* 112 Fed. 505. Under the common law rule a creditor having only a contingent claim, such as was that of the petitioner at the time respondent made the transfer in question, is protected against fraudulent conveyance. And petitioner, from the time that it became surety on Mogliani's bond, was entitled as a creditor under the agreement to invoke that rule. *Yeend* v. *Weeks,* 104 Ala. 331, 341. *Whitehouse* v. *Bolster,* 95 Me. 458. *Mowry* v. *Reed,* 187 Mass. 174, 177. *Stone* v. *Myers,* 9 Minn. 287, 294. *Cook* v. *Johnson,* 12 N. J. Eq. 51. *American Surety Co.* v. *Hattrem,* 138 Ore. 358, 364. *U. S. Fidelity & Guaranty Co.* v. *Centropolis Bank,* 17 F. (2d) 913, 916. *Thomson* v. *Crane,* 73 Fed. 327, 331.

As the Circuit Court of Appeals, upon constructions of §§ 1 (9) and 3a (1) which we hold erroneous, disposed of the case without deciding other questions there raised, the decree will be reversed and the case will be remanded to that court for further consideration and proceedings in harmony with this opinion.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.